No. 963

Supreme Court, U.S.
FILED
OCT 23 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALBERT MENGARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of conspiracy to evade a substantial part of the federal excise tax imposed upon wagers, in connection with the Rendezvous Space and Sports Book which he and his partner, Richards, operated. The court of appeals affirmed (Pet. 1a-8a).[1]

[1] The court of appeals concluded that the "evidence leaves no doubt but that the Rendezvous Race Book did evade the tax on a substantial portion of its business and was operated

As appears from the opinion below, the scheme proved was that the bookmaking operation would accept bets in two forms. Those from casual customers would be by printed ticket with the 10% tax paid by the customers. Regular customers would write out their bets on white slips of paper and would not pay the tax. The tax returns for the period from April 1965 through January 1966, closely corresponded to the printed tickets. Following extensive investigation by treasury agents, search warrants were obtained for various locations to seize the records of the business. The warrants were served on February 19, 1966. Among other things, the government obtained not only printed tickets, but also white slips for the period February 12-18, 1966 (Pet. 4). Since these records were seized before the tax return was due, the failure to pay the amount due on wagers for February was not charged in the indictment, but the government did show that the white slips for the week of February 12-18 totaled more than $70,000, whereas the printed slips totaled a little more than $14,000.

The petition challenges only the admissibility of Exhibit 14, a box of printed tickets for the week of February 12-18 which were given to federal agents by Harold Kline, a cashier of petitioner's business establishment. (Tr. 231-233). Petitioner made no motion to suppress before trial but did so after an agent

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[Footnote continued.]

in a manner calculated to accomplish that purpose." (Pet. 4a). Neither this conclusion nor the sufficiency of the evidence is challenged by petitioner.

testified that, at the time the search warrant was executed, Mr. Kline told him that certain records of the business were at his home (Tr. 247)[2] and that the agent accompanied Kline to his home where the latter gave the agent the records (Tr. 228-229, 231).

The trial court admitted the records, subject to a post-trial motion to suppress at which petitioner could show that the issue could not have been timely raised (Tr. 309). At the hearing on that motion, the defense declined to offer any additional evidence but rested on the record at trial (Tr. 635). The government introduced evidence showing that the defense knew of the government's possession of these records long before trial (Tr. 638-640, 645-649). The court denied the motion, finding it inconceivable that petitioner had not been aware of how the records were obtained, that "no evidence ha[d] been presented to show to the contrary" and that, accordingly, the motion was "not timely" (Tr. 652). The court also found that Mr. Kline had possession of the records and authority to consent to seizure of the records which belonged to the business. Noting that there was a warrant for the seizure of the business premises, the court held it was "not an unreasonable extension to permit a search of nearby premises where the records were temporarily stored." (*Ibid*).

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[2] The agent said that Kline had refused to answer "certain questions" on the ground that the answers would incriminate him (Tr. 247). Two agents went to Kline's house. When Kline indicated that his wife would be upset if she saw them, he was told that he could tell her that they were auditors who were picking up Rendezvous records (Tr. 249-250).

The court of appeals affirmed without considering the timeliness of the motion to suppress, finding both that Kline had authority to consent and that the seizure under the authority of the warrant was reasonable in the circumstances. The court pointed out in this connection that if Kline had authority to take the records he had authority to bring them back to the premises where they would have been seized under the warrant (Pet. 6a).

It is thus evident that this case does not present the general question raised in the petition of the authority of a third party to consent to a search (Pet. 6). The decision below rests on the particular circumstances that business records which the law required petitioner to keep[3] and which were properly subject to seizure under a valid warrant, happened, when the warrant was executed, to be at the home of petitioner's cashier who turned them over to the agent.

A long-standing principle emerging from the decisions of this Court is that the "specific content and incidents of [the right to be secure against unreasonable searches and seizures] must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures'" *Terry* v. *Ohio*, 392 U.S. 1, 9; *Elkins* v. *United States*, 364 U.S. 206, 222. That context underscores the reasonableness of the official activity in this case. Kline's authority to

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[3] As the court below noted, these records were required under Nevada law, and were to be available for inspection by state and federal authorities (Pet. 5a-6a).

consent was apparent from the fact that the records had been entrusted to his care. Significantly petitioner, although given every opportunity to do so, failed to present any evidence to show either Kline's lack of authority or lack of consent. At all events, the opinion below correctly points out (Pet. 6a-7a) that in the circumstances here the taking of the records from Kline, irrespective of his authority, was as to petitioner's rights no different from the taking of other records of his business under authority of the warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 407421 279